

July 15, 2004

AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-19 is available for public comments under this procedure. It was requested by Andrew W. Mitchell, on behalf of DollarVote.org.

Proposed Advisory Opinion 2004-19 is scheduled to be on the Commission's agenda for its public meeting of Thursday, July 22, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern) on July 21, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-19, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Associate General Counsel
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Margaret Perl
Staff Attorney

Subject: Draft AO 2004-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 22, 2004.

Attachment

1 ADVISORY OPINION 2004-19

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4 Mr. Andrew W. Mitchell
5 President, DollarVote.org
6 908 N. Wayne Street
7 Suite 303
8 Arlington, Virginia 22201

DRAFT

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11 Dear Mr. Mitchell:

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This responds to your letters dated May 19, June 2 and June 7, 2004 requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to your proposed internet-based service.

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16 ***Background***

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You state that you are the president of DollarVote.org (“DollarVote”), a Virginia C corporation, which plans to provide certain nonpartisan commercial services to both citizens and candidates via a website. You describe the central service as the “DollarVote plan” (“Plan”). You state that under this two-part Plan, DollarVote accepts and forwards contributions from individuals earmarked for candidates in specific upcoming elections.

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Under the Plan, DollarVote would compose and post on its website various position statements on certain political issues, referred to as “DollarBills.” DollarVote selects the issues to include on the website and writes the DollarBill statements without any candidate participation. You state that individual citizens may access the website upon paying a proposed \$10 annual subscription fee. Individual subscribers may then view the DollarBills and “vote” by choosing to contribute funds to the candidate or candidates who have posted on the website their “promise” to support that position statement. If there are not yet any

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1 actual candidates listed as “promising” to support that DollarBill at the time of the
2 individual’s vote, the contributed funds will go to the first future candidate who registers a
3 “promise” for that DollarBill. You state that the subscriber also selects an “alternative
4 recipient organization” from a list of available non-profit entities organized under section
5 501(c)(3) of the Internal Revenue Code (“501(c)(3) organizations”). DollarVote will
6 forward the contribution to this alternative recipient 501(c)(3) organization if no candidate
7 “promises” to support the selected DollarBill by the second Tuesday of October. You state
8 that these 501(c)(3) organizations will be notified of their selection in the DollarVote
9 process and presented with the opportunity to refuse to participate. You explain that you
10 will also charge subscribers a small processing fee (proposed as 5% of the contribution) per
11 vote. When a subscriber completes the purchase with a credit card, DollarVote will retain
12 the subscription and processing fees in the corporation’s general accounts, but the
13 contributed funds will be routed to a merchant account separate from the corporation’s
14 general accounts.

15 You explain that the second half of the Plan would entail charging candidates a
16 “substantial account fee” once per election for the ability to register “promises” related to
17 the DollarBills posted on the website. You state that if one or more candidates have
18 “promised” to support a DollarBill, their names will be visible to the individual subscribers
19 under the DollarBill. All contributions already “voted” for a DollarBill, if any, will be
20 forwarded to the first candidate who has “promised” regarding that DollarBill. If multiple
21 candidates “promise” on the same DollarBill, then all additional contributions will be
22 distributed equally between the listed candidates. You state that once a candidate has

1 registered a “promise,” the earmarked contributions for that DollarBill, minus transaction
2 charges, will be forwarded to the candidate(s) within 10 days of receipt.

3 You also list particular terms and conditions, which you anticipate will be included
4 in any future agreements with candidates to obtain DollarVote’s services. Among these
5 terms are the following:

- 6 • DollarVote may set a limit on the number of promising candidates who may
7 simultaneously receive funds earmarked with respect to a particular position
8 statement.
- 9 • No candidate may be the “first promiser” on more than one DollarBill.
- 10 • DollarVote may set a limit on the total amount of funds a candidate may receive
11 during a designated election.
- 12 • DollarVote may disallow candidates from promising for certain combinations of
13 DollarBills.

14 Your request describes the screening and processing measures you propose to
15 include in your service to prevent excessive contributions and contributions from prohibited
16 sources under the Act. You state that these procedures are modeled after relevant past
17 advisory opinions regarding contributions through the Internet. You also describe
18 additional details of the Plan, and include sample web pages regarding the “voting” and
19 contribution processes, sample DollarBills. You also provide detailed descriptions of the
20 processing of contributions through merchant accounts to the final candidate(s) or
21 alternative recipient organization. You also state that DollarVote plans to provide a number

1 of other “informative and interactive” services that will not involve contributions to
2 candidates.

3 ***Question Presented***

4 *May DollarVote receive earmarked contributions from individuals and forward*
5 *those contributions to Federal candidates or to certain 501(c)(3) organizations under the*
6 *proposed Plan?*

7 ***Legal Analysis and Conclusions***

8 No, DollarVote may not do so because it is a corporation and may not act as a
9 conduit or intermediary for earmarked contributions, and DollarVote does not meet the
10 commercial fundraising firm exception to the definition of “conduit or intermediary” in 11
11 CFR 110.6(b)(2).¹

12 The Act and Commission regulations permit a conduit or intermediary to collect and
13 forward contributions from individuals that have been earmarked for a specific candidate,
14 subject to certain limitations and reporting requirements. 2 U.S.C. 441a(a)(8); 11 CFR
15 110.6. However, Commission regulations state that any person who is prohibited from
16 making contributions or expenditures is also prohibited from acting as a conduit or
17 intermediary for contributions earmarked to candidates. 11 CFR 110.6(b)(2)(ii). Because
18 DollarVote is a corporation prohibited from making contributions, it may not use the
19 proposed Plan to collect and forward earmarked contributions under 11 CFR 110.6 unless it
20 meets a regulatory exception to the definition of “conduit or intermediary.” *See also* 2
21 U.S.C. 441b(a); 11 CFR 110.6(b)(2)(ii) and 114.2(b)(1). Commission regulations establish

¹ While it appears that DollarVote would qualify for the “commercial vendor” exception in 11 CFR 114.2(f)(1) under the facts you present, it must also satisfy the more narrow exception for a “commercial fundraising firm” under 11 CFR 110.6(b)(2)(i)(D) for the Plan to comply with all of the requirements of the Act and Commission regulations.

1 certain exceptions to this definition, including “[a] commercial fundraising firm retained by
2 the candidate or the candidate’s authorized committee to assist in fundraising.” 11 CFR
3 110.6(b)(2)(i)(D).

4 Commission regulations created this exception from the definition of “conduit or
5 intermediary” because a commercial fundraising firm hired by a candidate’s authorized
6 committee is more properly considered an agent of the committee than an independent
7 conduit or intermediary. *See* Final Rules and Explanation and Justification of Regulations
8 on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution
9 Limitations and Earmarked Contributions, 54 Fed. Reg. 34098, 34106 (Aug. 17, 1989).
10 This interpretation is consistent with the other exceptions to the definition of “conduit or
11 intermediary” for campaign employees and volunteers, joint fundraising representatives,
12 affiliated committees, and authorized individuals who hold significant positions in the
13 campaign – all of whom are acting as agents of the candidate or the authorized committee
14 when engaging in fundraising. *See* 11 CFR 110.6(b)(2)(i)(A), (B), (C) and (E). However,
15 under the proposed Plan, DollarVote’s authority and autonomous decision-making exceeds
16 those of an agent acting at the instruction of the candidates or candidate committees who
17 will subscribe to the services offered.²

18 First, DollarVote exclusively determines the wording and posting of the DollarBills
19 made available for contributions and promises by candidates. DollarVote chooses which
20 issues it will post on the website and writes the position statements without input from the

² Your request does not seek recognition under the “commercial fundraising firm” exception. Instead, your discussions of proposed reporting, screening, and transferring of contributions illustrates your intent to act as an independent conduit or intermediary under section 110.6, not as an agent of the candidate committees. However, because DollarVote is a corporation, it cannot act as an independent conduit or intermediary under section 110.6. *See* 11 CFR 110.6(b)(2)(ii).

1 candidates who subscribe to DollarVote's services. In this way, DollarVote is acting
2 independently and not as an agent of the candidates' committees.

3 Moreover, DollarVote ultimately decides to whom the money is sent, not the
4 contributor who "votes," because the proposed terms and conditions of the Plan allow
5 DollarVote to decide which candidates receive contributions earmarked for a particular
6 DollarBill, and how much money each candidate will receive. DollarVote would regulate
7 how much each candidate will be given when the contributed amounts are split because it
8 can set a limit on the number of promising candidates for a particular DollarBill, thereby
9 increasing or decreasing each candidate's pro-rated amount. DollarVote also explicitly
10 determines how much money each candidate receives because it can set a limit on the total
11 funds a candidate may receive from all DollarBill promises combined during the election.
12 In addition to choosing and writing the DollarBill statements themselves, DollarVote
13 directs the candidates' choices of "promises" by determining the number of total candidates
14 for certain promises, prohibiting a candidate from being the "first promiser" on more than
15 one DollarBill, and reserving the right to stop candidates from promising on certain
16 combinations of DollarBills (as determined by DollarVote). The result is that DollarVote
17 exercises substantial influence over the distribution of the contributions, allowing for the
18 opportunity to benefit certain candidates instead of others. Under the Plan, DollarVote's
19 discretion over the disposition of contributions establishes that DollarVote is not an "agent"
20 of the contracting candidates. *Compare* the Plan *with* Advisory Opinion 2002-07. Thus,
21 DollarVote does not qualify as a "commercial fundraising firm" under section
22 110.6(b)(2)(i)(D).

1 Because DollarVote does not meet the “commercial fundraising firm” exception, it
2 would be considered a conduit or intermediary for earmarked contributions under section
3 110.6. As a corporation, DollarVote is prohibited from acting as a conduit or intermediary
4 under section 110.6(b)(2)(ii).³ Therefore, DollarVote may not receive earmarked
5 contributions and forward these contributions under the proposed Plan.

6 This response constitutes an advisory opinion concerning the application of the Act
7 and Commission regulations to the specific transaction or activity set forth in your request.
8 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts
9 or assumptions presented, and such facts or assumptions are material to a conclusion
10 presented in this advisory opinion, then the requestor may not rely on that conclusion as
11 support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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20 Enclosures (AO 2003-23, 2002-07)

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³ Your situation is materially different from Advisory Opinion 2003-23, in which the requestor (WE LEAD) was a federal political committee permitted to make contributions and expenditures under the Act.